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25 **UNITED STATES DISTRICT COURT**
26 **CENTRAL DISTRICT OF CALIFORNIA**

27 MOOG INC.,

28 Plaintiff,

v.

MOOG INC., et al.,

Defendants.

CASE NO. 2:22-cv-09094-GW-MAR

**DEFENDANTS MISOOK KIM AND ALIN
PILKINGTON'S NOTICE OF JOINDER
AND JOINDER IN SKYRYSE, INC.'S
MOTION TO STAY**

*[Declarations of Grant G. Gelberg and Rachel
Fiset filed concurrently herewith]*

The Honorable George H. Wu

Hearing Date: April 13, 2023

Time: 8:30 a.m.

Courtroom: 9D

1 **TO THE COURT, ALL PARTIES, AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that Defendants Misook Kim (“Ms. Kim”) and Alin
3 Pilkington (“Mr. Pilkington,” collectively “Individual Defendants”) hereby join Defendant
4 Skyryse, Inc.’s (“Skyryse”) Motion to Stay filed on March 15, 2023. (ECF No. 392.)

5 The Individual Defendants hereby incorporate into this Joinder, by this reference,
6 Skyryse’s Motion to Stay, the complete files and records in this action, and the arguments
7 and evidence presented at the time of hearing, and reserve the right to supplement
8 Defendant Skyryse’s Motion to Stay with facts and concerns unique to the Individual
9 Defendants, as appropriate.

10 DATED: March 16, 2023

11 HALPERN MAY YBARRA & GELBERG LLP

12 By: */s/ Grant B. Gelberg*
13 GRANT B. GELBERG

14 Attorneys for Defendant
15 MISOOK KIM

16 DATED: March 16, 2023

17 ZWEIBACK, FISET & ZALDUENDO LLP

18 By: */s/ Rachel L. Fiset*
19 RACHEL L. FISET

20 Attorneys for Defendant
21 ALIN PILKINGTON

22 **ATTESTATION**

23 Pursuant to Local Rule 5-4.3.4(a)(2), I hereby attest that all signatories listed
24 above, and on whose behalf the filing is submitted, concur in the filing’s content and
25 have authorized the filing.

26 DATED: March 16, 2023

27 By: */s/ Grant B. Gelberg*
28 GRANT B. GELBERG

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 A. INTRODUCTION

3 Defendant Skyryse's ("Skyryse") Motion to Stay (ECF No. 392) sets out in detail
4 the reasons why this case should be stayed pending the government's ongoing and
5 interrelated criminal trade secrets investigation. Defendants Misook Kim ("Ms. Kim")
6 and Robert Alin Pilkington ("Mr. Pilkington" and, collectively with Ms. Kim, the
7 "Individual Defendants") submit this joinder to highlight the specific reasons why a stay
8 is needed. The Individual Defendants face a Hobson's choice of whether to vigorously
9 defend this civil action brought against them by their former employer—a large
10 corporation with significant resources—or invoke their constitutional rights in response
11 to an ongoing federal criminal investigation that is intertwined with this civil case. This
12 false choice stems from Plaintiff Moog Inc.'s ("Moog") referral of this case to the U.S.
13 Attorney's Office ("USAO") so that it could force the Individual Defendants' Fifth
14 Amendment invocation, giving Moog an unfair and unearned tactical advantage in this
15 case. At the same time, Moog used court processes, while this case was pending in the
16 Western District of New York, to block the the Individual Defendant's proper Fifth
17 Amendment assertion over the production of digital devices so that it can obtain these
18 items and provide them to the government. This type of compelled disclosure is
19 precisely what the Fifth Amendment prohibits. Absent a stay, the Individual Defendants'
20 Fifth Amendment rights will be further eroded, while at the same time they will face the
21 real threat of financial ruin because they cannot vigorously defend themselves against
22 Moog's allegations in this action.

23 This danger is heightened because the government and Moog are working closely
24 together to develop theories and obtain potential evidence. Cross-pollination of ideas,
25 documents, and strategy abound as Moog feeds the government information it receives in
26 civil discovery and the government then demands information from the Individual
27 Defendants through Grand Jury subpoenas, third party subpoenas, and document
28 preservation requests. This close coordination between Moog and the government

1 effectively means that the Individual Defendants must deal with the government on two
 2 fronts—one criminal and the other civil—under two different sets of discovery rules.
 3 This is unfairly prejudicial and a stay of this action is needed to protect the fundamental
 4 rights of the Individual Defendants.

5 **B. FACTUAL BACKGROUND¹**

6 **1. Moog Is Feeding The Government Information To Use In Its Criminal
 7 Investigation**

8 The Individual Defendants are software engineers who worked for decades in the
 9 aviation industry. They are not executives, and they are not wealthy. Until Moog’s
 10 dispute with Skyryse, both had sterling reputations in the industry and neither had ever
 11 been in trouble with the law. Since joining other former Moog employees at Skyryse,
 12 their lives have been turned upside down, and (due to Moog’s efforts) they are now
 13 targets of a federal criminal investigation for the same conduct that is the subject of this
 14 action.

15 At the outset of this action in March 2022, the parties agreed to provide early
 16 discovery to Moog well in advance of the Rule 26(f) conference, which still has not taken
 17 place. (ECF No. 25.) When the Individual Defendants handed over their digital devices
 18 to a third party vendor under this protocol, they did not know that, at Moog’s urging, the
 19 government had launched a federal criminal trade secrets investigation. Only weeks
 20 later, in June 2022, the Individual Defendants received Grand Jury subpoenas from the
 21 USAO. (Declaration of Grant B. Gelberg (“Gelberg Decl.”) ¶ 2, Ex. 1; Declaration of
 22 Rachel Fiset (“Fiset Decl.”) ¶ 3, Ex. 1.) The Individual Defendants immediately asserted
 23 their Fifth Amendment rights and sought the return of their devices from the third party
 24 vendor. (ECF Nos. 216, 229.) Its trap set, Moog pounced and moved the New York
 25 court for an order finding that the Individual Defendants had lost any Fifth Amendment
 26 rights over the devices. (ECF No. 228.)

27
 28 ¹ Skyryse’s Motion to Stay provides a detailed factual and procedural background, which
 the Individual Defendants incorporate by reference. (ECF No. 392 at 7-13.)

1 Moog's strategy is problematic because Moog and the government are working
2 hand in glove. On July 5, 2022, FBI Special Agent Robert Shaw ("SA Shaw") and
3 Assistant United States Attorney Reema El-Amamy ("AUSA El-Amamy") told counsel
4 for Ms. Kim that the government's criminal investigation largely tracked the allegations
5 in Moog's civil complaint and referred counsel to that complaint for further information.
6 (Gelberg Decl. ¶ 3; Fiset Decl. ¶ 4.) Following these discussions, the Individual
7 Defendants invoked their respective Fifth Amendment rights in response to a Grand Jury
8 subpoena. (*Id.*) On November 7, 2022, AUSA El-Amamy emailed counsel for Ms. Kim
9 the following: "I've produced to you some pre-indictment discovery so that you can get a
10 sense of the government's criminal investigation. This pre-indictment discovery,
11 combined with the civil litigation in WDNY, should give you a good sense of the
12 government's investigation and potential charges." (Gelberg Decl. ¶ 4, Ex. 2; Fiset Decl.
13 ¶ 5, Ex. 3.) Further, a document provided to the Individual Defendants by the
14 government referenced an Excel table from Moog that purported to list Moog files
15 allegedly downloaded by Ms. Kim. (Gelberg Decl. ¶ 5; Fiset Decl. ¶ 5.)

16 Moog's cooperation with the government in furtherance of the criminal
17 investigation and the civil action is extensive. Based on files produced by Moog in civil
18 discovery, Moog and the FBI coordinated on myriad issues including, but not limited to
19 the status of filings in this Action, Moog's own forensic investigation of the Individual
20 Defendants' alleged downloads, summaries of information Moog's counsel received from
21 Defendants, and a timeline Moog created in conjunction with the drafting of the
22 Complaint, among others. (Gelberg Decl. ¶ 6.) The FBI also sent Moog lists of
23 questions to answer, requested information related to hard drives related to Ms. Kim, and
24 sought to interview Moog employees. (*Id.*) These materials indicate the government is
25 using the civil discovery in this action to obtain evidence for its criminal investigation
26 that it would not otherwise be entitled to under Federal Rule of Criminal Procedure 16(b).

27 Moreover, the government is using information gathered from the civil case for
28 additional grand jury subpoenas. Moog, Skyryse, and the Individual Defendants (through

1 prior counsel) entered into a stipulation requiring that certain devices be turned over to
2 the custody of third-party forensics firm iDiscovery Solutions (“iDS”). (See ECF No.
3 25.) Then, on or about February 27, 2023, iDS received a grand jury subpoena from the
4 government demanding a list of the forensic images in iDS’ possession. (Gelberg Decl. ¶
5 7, Ex. 3.) Shortly thereafter, the government sent a request for the preservation of
6 records to the Individual Defendants. (Gelberg Decl. ¶ 8.) The letter demanded
7 preservation and confirmation of possession of the very same electronic devices listed in
8 the Stipulation. (Gelberg Decl. ¶ 9; Fiset Decl. ¶ 7, Ex. 4.) In an email to counsel, the
9 FBI agent described the preservation letter as “related to the Moog v. Skyryse suit.”
10 (Gelberg Decl. ¶ 8; Fiset Decl. ¶ 7, Ex. 4.)

11 **C. ARGUMENT**

12 **1. The Individual Defendants Face Substantial Prejudice If This Action Is 13 Not Stayed**

14 Based on the relationship between Moog and the government, any statement the
15 Individual Defendants make in this case or any document produced by them will be
16 provided to the government for use in its investigation. And as the government’s
17 investigation mirrors the civil case, the government will likely find any statements or
18 productions made by the Individual Defendants relevant to its criminal investigation.
19 Under the circumstances, the Individual Defendants have no choice but to assert their
20 Fifth Amendment rights in response to any discovery requests. Doing so, however, will
21 gut their ability to mount a vigorous defense in the civil case, which will have disastrous
22 financial consequences for them and their families. *See Brock v. Tolkow*, 109 F.R.D.
23 116, 120 (E.D.N.Y. 1985) (“If the defendants are served with [discovery] in the civil
24 case, they must decide whether to respond or to assert their rights under the fifth
25 amendment. If they choose the former course, they risk providing the government with
26 leads or evidence that may be used against them in the criminal case. If they choose the
27 latter course, they greatly increase the chance that they be found liable in civil case for
28 substantial sums of money.”).

1 Under these circumstances, Courts have broad discretion to stay a civil action
 2 pending the outcome of criminal proceedings. *See, e.g., SEC v. Dresser Indus., Inc.*, 628
 3 F.2d 1368, 1375 (D.C. Cir. 1980); *see also Keating v. Office of Thrift Supervision*, 45
 4 F.3d 322, 324 (9th Cir. 1995); *Brock*, 109 F.R.D. at 120-21 (“A stay of civil discovery
 5 until after criminal proceedings are complete will enable them to defend the civil case
 6 vigorously without fear of subsequent prosecution. . . . ‘While a stay . . . may cause some
 7 inconvenience and delay to the [government], protection of defendant[s’] constitutional
 8 rights against self-incrimination is the more important consideration.’” (citation
 9 omitted); *see also Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 527
 10 (D.N.J. 1998).

11 This is particularly so where, as here, the denial of a stay could, among other
 12 things, “impair a party’s Fifth Amendment privilege against self-incrimination, extend
 13 criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure
 14 16(b), expose the defense’s theory to the prosecution in advance of trial, or otherwise
 15 prejudice the criminal case.” *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich.
 16 2007) (citation omitted). The court must make the determination whether to stay the civil
 17 action “in the light of the particular circumstances of the case.” *Dresser Indus.*, 628 F.2d
 18 at 1375; *see also Keating*, 45 F.3d at 324.

19 Courts in the Ninth Circuit weigh six factors to determine whether a stay of a civil
 20 action in lieu of criminal proceedings is warranted: (1) “the extent to which the potential
 21 criminal defendant’s Fifth Amendment rights are implicated”; (2) “the interest of the
 22 plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it,
 23 and the potential prejudice to plaintiffs of a delay”; (3) “the burden which any particular
 24 aspect of the proceedings may impose on defendants”; (4) “the convenience of the court
 25 in the management of its cases, and the efficient use of judicial resources”; (5) “the
 26 interests of persons not parties to the civil litigation”; and, (6) “the interest of the public
 27 in the pending civil and criminal litigation.” *Taylor, Bean & Whitaker Mortg. Corp. v.*
 28 *Triduanum Fin., Inc.*, No. CIV. 2:09-cv-0954 FCD EFB, 2009 WL 2136986, at *2 (E.D.

1 Cal. July 15, 2009) (granting potential criminal defendant's motion to stay) (citing
 2 *Keating*, 45 F.3d at 324-35). "Balancing these factors is a case-by-case determination,
 3 with the basic goal being to avoid prejudice." *Volmar Distrib., Inc. v. New York Post*
 4 *Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993); *see also Walsh Sec.*, 7 F. Supp. 2d at 527;
 5 *Taylor, Bean & Whitaker Mortg.*, 2009 WL 2136986, at *2.

6 As discussed in depth in Skyryse's Motion, each of these factors supports a stay.
 7 The Individual Defendants will not repeat these arguments, but underscore for the Court
 8 how squarely their respective Fifth Amendment rights are implicated by Moog's claims.
 9 Moog instigated the criminal investigation and it is working hand-in-hand with the
 10 government by, among other things, obtaining information from Moog and then using
 11 that information to take investigative steps related to the "Moog v. Skyryse suit."
 12 (Gelberg Decl. ¶ 8; Fiset Decl. ¶ 7, Ex. 4.) Under these unusual circumstances, the
 13 Individual Defendants have no choice but to assert their constitutional rights.

14 Beyond the implication of their Fifth Amendment rights, the Individual Defendants
 15 are further prejudiced by fighting on two fronts—this civil action and the criminal
 16 investigation—that are aligned and cooperating with each other. Unless the case is
 17 stayed, Moog will use the Individual Defendants' exercise of their constitutional rights
 18 against them, which could leave them penniless. The Individual Defendants have been
 19 unemployed for nearly one year as a result of these proceedings. A stay will allow the
 20 Individual Defendants to use their limited resources to address the criminal investigation.
 21 Addressing the criminal investigation first will likely narrow or resolve many of the
 22 issues in dispute, which promotes efficiency for the parties and the Court.

23 Moog will not be prejudiced by a stay. Moog has already taken voluminous
 24 discovery and pertinent electronic devices are in the custody of iDS. Therefore, there is
 25 no risk that evidence might be lost if civil discovery is stayed. Nor can Moog
 26 realistically argue that the Individual Defendants pose any risk to its business. The
 27 Individual Defendants no longer work at Skyryse and they are not competing with Moog,
 28 further reducing the risk that a stay will unfairly prejudice Moog.

The prejudice to the Individual Defendants is compounded by Moog's efforts to limit the scope of their respective Fifth Amendment invocations. (See ECF No. 228.) Moog's strategy in the civil litigation—to force the Individual Defendants to invoke but then attempt to vitiate that invocation in court—has potentially far reaching consequences for the the Individual Defendants, as any information the Individual Defendants are compelled to provide in this case will be handed over by Moog to the government. The result will be the government gaining access to evidence it could not obtain by subpoena or under Federal Rule of Criminal Procedure 16. Accordingly, a stay is the only means to protect the rights of the Individual Defendants.

D. CONCLUSION

In light of the foregoing, the Individual Defendants respectfully request that the Court grant Skyrse's motion to stay these proceedings pending the outcome of the ongoing criminal investigation.

DATED: March 16, 2023

HALPERN MAY YBARRA & GELBERG LLP

By: /s/ Grant B. Gelberg
GRANT B. GELBERG

Attorneys for Defendant
MISOOK KIM

DATED: March 16, 2023

ZWEIBACK, FISSET & ZALDUENDO LLP

By: /s/ Rachel L. Fiset
RACHEL L. FISET

Attorneys for Defendant
ALIN PILKINGTON

ATTESTATION

Pursuant to Local Rule 5-4.3.4(a)(2), I hereby attest that all signatories listed

1 above, and on whose behalf the filing is submitted, concur in the filing's content and
2 have authorized the filing.

3 DATED: March 16, 2023

4 By: */s/ Grant B. Gelberg*
GRANT B. GELBERG

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